

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE
1000 Defense Pentagon
Washington, D.C. 20301-1000

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

FEDERAL BUREAU OF INVESTIGATION
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Defendants.

No. _____

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief, seeking the immediate processing and release of agency records requested by Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively “ACLU”) from Defendants U.S. Department of Defense (“DoD”), U.S. Department of Justice (“DoJ”), and Federal Bureau of Investigation (“FBI”).

2. Plaintiffs submitted a FOIA request (“2008 Request”) to the DoD, DoJ, and FBI on April 22, 2008, after several news sources reported that the DoD had delayed the release of a report by the DoJ’s Office of the Inspector General (“OIG”) concerning FBI involvement in the interrogation of detainees held in Iraq, in Afghanistan, and at Guantánamo Bay. The 2008 Request sought the release of “all records relating to” the OIG’s investigation.

3. Defendants DoJ and DoD have both denied Plaintiffs’ request for expedited processing. None of the Defendants have issued a final determination on Plaintiffs’ request for a waiver of search, review and duplication fees. While a redacted version of the OIG’s report was released publicly on May 20, 2008, Defendants have not responded to Plaintiffs’ request for records relating to the investigation, nor have they justified the redactions in the report itself.

4. The records that Plaintiffs have sought would aid the public’s understanding of the policies that led to the abuse and torture of prisoners in U.S. custody. Plaintiffs seek an injunction requiring Defendants immediately to process the 2008 Request.

Jurisdiction and Venue

5. This Court has both subject matter jurisdiction of the FOIA claim and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

6. Plaintiff American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to the constitutional

principles of liberty and equality. The ACLU is committed to ensuring that the treatment of prisoners within U.S. custody is consistent with the government's obligations under domestic and international law.

7. Plaintiff American Civil Liberties Union Foundation is a separate 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties.

8. Defendant DoD is a Department of the Executive Branch of the United States Government. DoD is an agency within the meaning of 5 U.S.C. § 552(f)(1).

9. Defendant DoJ is a Department of the Executive Branch of the United States Government. DoJ is an agency within the meaning of 5 U.S.C. § 552(f)(1). Defendant FBI is a component of DoJ.

Factual Background

The 2003 and 2004 FOIA Requests

10. In October 2003, in response to news reports alleging the mistreatment of detainees in U.S. custody, the ACLU submitted a FOIA request ("2003 Request") seeking records relating to the treatment of individuals detained by the United States after September 11th and held on military bases or in detention facilities outside the United States. The ACLU filed a second, substantively identical request in May 2004 ("2004 Request"). The records that the ACLU has obtained as a result of this litigation are posted on the ACLU's website. See <http://www.aclu.org/torturefoia>; <http://www.aclu.org/torturefoia/search>. Some of the more significant documents have been compiled in a recently published book. Jameel Jaffer and Amrit Singh,

Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond (Columbia University Press 2007).

11. Among the documents the ACLU received as a result of litigation relating to the 2003 and 2004 Requests are documents in which FBI personnel expressed concern over the interrogation methods being used in Iraq, in Afghanistan and at Guantánamo Bay. These documents, obtained by the ACLU in late 2004, generated national concern about the government's interrogation policies. *See, e.g.*, David Johnston, *More of FBI Memo Criticizing Guantánamo Methods is Released*, N.Y. Times, Mar. 22, 2005; Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. Times, Jan. 6, 2005; Dan Eggen and R. Jeffrey Smith, *New Papers Suggest Detainee Abuse Was Widespread*, Wash. Post, Dec. 22, 2004; Dan Eggen and R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, Wash. Post, Dec. 21, 2004; *U.S. Pledges New Jail Abuse Inquiry*, BBC News, Dec. 21, 2004; Neil Lewis and David Johnston, *New FBI Files Describe Abuse of Iraq Inmates*, N.Y. Times, Dec. 21, 2004; *FBI Reports Guantanamo "Abuse"*, CNN.com, Dec. 8, 2004; Neil Lewis, *FBI Memos Criticized Practices at Guantánamo*, N.Y. Times, Dec. 7, 2004.

The OIG's Investigation

12. After the ACLU obtained and publicized the FBI documents, the OIG initiated an investigation into the FBI's involvement in detainee interrogations. The January 2005 announcement of this investigation received widespread media attention. *See, e.g.*, *Justice Department Probing FBI Claims of Prisoner Abuse*, Agence France Presse, Jan. 15, 2005; Carol Rosenberg, *U.S. Examines FBI's Charges of Prison Abuse*, Miami Herald, Jan. 15, 2005; *New Probe Into FBI Allegations of Camp Abuse*, Taipei Times,

Jan. 15, 2005; Eric Lichtblau, *Justice Dept. Opens Inquiry into Abuse of U.S. Detainees*, N.Y. Times, Jan. 14, 2005. There was renewed media interest in anticipation of the report's release in early 2008. *See, e.g.*, Emma Schwartz, *Report Due on FBI Treatment of Military Detainees*, U.S. News and World Report, Feb. 8, 2008.

13. On April 10, 2008, McClatchy Newspapers reported that the OIG's investigation had been complete for months but that the release of the report had been delayed because of a DoD declassification review. Marisa Taylor, *Lengthy Pentagon Review Delays Report on Terrorism Interrogations*, McClatchy Newspapers, Apr. 10, 2008 (reporting DoJ Inspector General Glenn Fine's concern that the DoD had not completed its declassification review "in a timely fashion"). Concerned that the DoD was using its declassification review as a pretext for denying the public timely access to the OIG's report, the ACLU filed a FOIA request on April 22, 2008 seeking "all records relating to the . . . OIG[]'s investigation into the involvement of the . . . FBI . . . in the interrogation of detainees held in Iraq, Afghanistan, and Guantánamo Bay."

14. Plaintiffs sought expedited processing of the 2008 Request on the grounds that there was a "compelling need" for the records sought by the request and because the records were urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 32 C.F.R. § 286.4(d)(3)(ii); 28 C.F.R. § 16.5(d)(1)(ii). Plaintiffs also sought expedited processing on the grounds that the records sought related to a "matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv).

15. Plaintiffs sought a waiver of search, review, and duplication fees on the grounds that disclosure was “likely to contribute significantly to public understanding of the operations or activities of the government and [was] not primarily in the commercial interest of the requester.” *See* 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.28(d); 28 C.F.R. § 16.11(k).

16. Plaintiffs also sought a waiver of search and review fees on the grounds that the ACLU is a “representative of the news media” and the records were not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 28 C.F.R. §§ 16.11(d), 16.11(c)(3).

17. On April 25, 2008, Defendant DoJ sent Plaintiffs a letter acknowledging receipt of the 2008 Request and denying the ACLU’s request for expedited processing. The DoJ did not address the ACLU’s request for a fee waiver. Defendant FBI sent Plaintiffs a letter on May 8, 2008 acknowledging receipt of the 2008 Request and indicating that the agency had begun a search for the requested records. The FBI did not address the ACLU’s request for expedited processing and a fee waiver.

18. On May 1, 2008, Defendant DoD sent Plaintiffs a letter acknowledging receipt of the 2008 FOIA and denying the ACLU’s request for expedited processing. DoD did not state a final determination concerning the ACLU’s request for a fee waiver. Instead, it indicated that it had placed the ACLU’s request in the “other” fee category, which allows two hours of search time and 100 pages of duplication free of charge. The DoD also indicated that it would conduct this search and make a fee waiver decision based on the results.

19. On May 20, 2008 the OIG publicly released a redacted version of its report, entitled “A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq.” The report discussed concerns raised by FBI agents about interrogation methods that had been used by DoD and CIA personnel; the response of FBI headquarters to the concerns raised by FBI agents; and the response of the DoD, CIA, and other agencies to concerns raised by FBI headquarters and the DoJ. According to the OIG report, the investigation was based on interviews with more than 230 witnesses and a review of more than 500,000 pages of documents.

20. The OIG’s report generated dozens of news stories. *See, e.g.,* Carrie Johnson and Josh White, *Interrogation Tactics Were Challenged at White House*, Wash. Post, May 22, 2008; *What the F.B.I. Agents Saw*, N.Y. Times, May 22, 2008; Eric Lichtblau and Scott Shane, *Report Details Dissent on Guantánamo Tactics*, N.Y. Times, May 21, 2008; Evan Perez, *Detainee Report Findings Detailed*, Wall St. Journal, May 21, 2008; Carrie Johnson and Josh White, *Audit Finds FBI Reports of Detainee Abuse Ignored*, Wash. Post, May 21, 2008; Dan Froomkin, *White House Ignored Torture Warnings*, Wash. Post, May 21, 2008; *Guantanamo: Immoral Ground*, Seattle Post-Intelligencer, May 21, 2008; Devin Montgomery, *FBI Agents Witnessed ‘Borderline Torture’ of Detainees*, Jurist, May 21, 2008; *Torture in America*, DailyKos, May 21, 2008; Richard Schmitt, *FBI Agents Objected to Military’s 9/11 Interrogations, Audit Finds*, L.A. Times, May 20, 2008; Kevin Johnson, *FBI Agents Objected to Interrogation Tactics*, USA Today, May 20, 2008; Michael Isikoff and Mark Hosenball, *‘Borderline Torture’*, Newsweek, May 20, 2008; Marisa Taylor, *FBI Agents’ Torture Warnings Ignored*,

Houston Chron., May 20, 2008; Lara Jakes Jordan, *Justice: FBI Flagged Mistreatment of Detainees*, Assoc. Press, May 19, 2008; Eric Lichtblau, *FBI Gets Mixed Review in Interrogation Report*, N.Y. Times, May 17, 2008 (anticipating report's content based on confidential sources).

21. Notwithstanding the OIG's release of a redacted version of its report, none of the Defendant agencies have provided Plaintiffs with any substantive response to the 2008 Request. Defendants have not responded to Plaintiffs' request for records relating to the investigation, nor have they justified the redactions in the report itself.

Causes of Action

1. Defendants' failure to make a reasonable effort to search for records sought by the 2008 Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and Defendants' corresponding regulations.

2. Defendants' failure to make promptly available the records sought by the 2008 Request violates the FOIA, 5 U.S.C. § 552(a)(3)(C), and Defendants' corresponding regulations.

3. Defendants' failure to grant Plaintiffs' request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E)(iii), and Defendants' corresponding regulations.

4. Defendants' failure to grant Plaintiffs' request for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and Defendants' corresponding regulations.

5. Defendants' failure to grant Plaintiffs' request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendants' corresponding regulations.

Requested Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Order Defendants immediately to process all records responsive to the 2008 Request;
- B. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the 2008 Request;
- C. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action; and
- D. Grant such other relief as the Court may deem just and proper.

Dated: June 12, 2008

Respectfully submitted,

Jameel Jaffer
Amrit Singh
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Phone: 212-549-2500
Fax: 212-549-2583

/s/ Arthur B. Spitzer

Arthur B. Spitzer (D.C. Bar. No. 235960)
American Civil Liberties Union
of the National Capital Area
1400 20th Street, N.W., Suite 119
Washington, D.C. 20036
Tel: (202) 457-0800
Fax: (202) 452-1868

Counsel for Plaintiffs